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# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-1869**

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO;

AND

THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

*Petitioners,*

VS.

GREYHOUND LINES, INC.,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## Brief of Respondent in Opposition

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | 1 |
| Statement of the Case | 3 |
| Argument | 5 |
| I. The Principles Which Control the Issuance of Injunctive Relief in an Arbitrable Labor Dispute Have Been Clearly Established by This Court | 6 |
| II. The Ninth Circuit Correctly Ruled That No Injunction Could Issue Where There Was No Wrong to Enjoin | 17 |
| Conclusion | 22 |

## TABLE OF AUTHORITIES


Cases — Pages

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) ..... 18

Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970) ..... 7, 8, 18, 19, 20

Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R., 363 U.S. 528 (1960) ..... 8, 9, 13, 17

Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) ..... 5, 6, 7, 8, 10, 11, 14, 15, 16, 18, 19, 20

Chicago & N.W. Ry. v. United Transportation Union, 402 U.S. 570 (1971) ..... 9

Detroit News Pub. Ass'n v. Detroit Type Union No. 18, 471 F.2d 872 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973) ..... 19

Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 370 U.S. 254 (1962) ..... 8-9, 13

Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974) ..... 18

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1966) ..... 18

Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336 (3d Cir. 1976) ..... 11

Letter Carriers, Branch 352 v. U.S. Postal Service, 88 LRRM 2678 (S.D. Iowa 1975) ..... 17

Lever Bros. Co. v. Intern'l Chem. Wkrs., ..... F.2d ....., 95 LRRM 2438 (4th Cir. Nov. 30, 1976) ..... 12, 13

Local 757 v. Budd Co., 345 F.Supp. 42 (E.D. Pa. 1972) 9

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) ..... 8, 13, 18





Pages

United Mine Wkrs. v. Rochester & Pitts. Coal Co., 416 F.Supp. 74 (W.D. Pa. 1976) ..... 5, 14, 20

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) ..... 6, 7, 8

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ..... 6, 7

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ..... 6, 7, 18

Westchester Lodge 2186 v. Railway Express Agency, Inc., 329 F.2d 748 (2d Cir. 1964) ..... 9

Statutes

28 U.S.C. § 1337 ..... 3

29 U.S.C. § 173(d) ..... 6

29 U.S.C. § 185 ..... 3, 8, 9, 13, 17, 19

45 U.S.C. § 151, et seq. ..... 9

Miscellaneous

Note, The Supreme Court, 1975 Term, 90 Harv. L. Rev. 247-55 (1976) ..... 5, 11, 14, 20

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## Brief of Respondent in Opposition

Respondent respectfully prays that this Court deny the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Petition presents no question appropriate for review by this Court.

### QUESTIONS PRESENTED FOR REVIEW

The Petition asks this Court to review the judgment of the Ninth Circuit reversing an order issuing a preliminary

injunction. The injunction intruded the district court into the merits of an arbitrable labor dispute by restraining an employer from taking certain action pending the arbitrator's ruling as to its right to take that action. The arbitration has been held and the arbitrator ruled against petitioner over a year ago. Therefore, review of the judgment of the Ninth Circuit can have no bearing on the underlying labor dispute. Moreover, the preliminary injunction expired by its terms, also over a year ago, upon the arbitrator's ruling in favor of the employer. Therefore, even if the judgment of the Ninth Circuit were in error, there remains no preliminary injunction to be reinstated. Based on these facts petitioner previously argued to this Court that this action was moot. (Brief in Opposition, No. 75-1584, pp. 12-13) The only differences are that the case is a year older and the Union is the petitioner now.

This Court should deny the Petition. If, however, the Petition were granted, the questions for review would be:

1. May a district court interfere in a labor dispute and issue a preliminary injunction which enjoins an employer from taking action pending arbitration where the employer has taken no action in violation of its promise to arbitrate the dispute and the preliminary injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute?

2. May a district court issue a preliminary injunction restraining an employer from taking certain action pending arbitration and thereby grant preliminarily the very relief which only the arbitrator could grant permanently without making the injunction bond payable upon the Union's losing on the merits before the arbitrator?



## STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("Section 301"). Jurisdiction in the district court was based upon Section 301 and upon 28 U.S.C. § 1337.

The employer is Greyhound Lines, Inc. ("Greyhound" or the "Company"). The plaintiffs are Amalgamated Transit Union, Division 1384, AFL-CIO, and The Amalgamated Council of Greyhound Divisions, AFL-CIO. Division 1384 represents Greyhound bus drivers in the Vancouver-Portland area and the Council represents all Greyhound bus drivers. Division 1384 and the Council are referred to in this brief collectively as "the Union".

Greyhound and the Union have been parties to a series of collective bargaining agreements for many years. The collective bargaining agreement relevant to this litigation (the "Agreement") contains provisions which govern the resolution of disputes arising from the Agreement. Specifically, the Agreement prohibits the Union from striking and prohibits the Company from engaging in a lockout. The Agreement also provides for the resolution of disputes by binding arbitration. (App. A, p. ii)* There is no provision which requires Greyhound to maintain the status quo pending arbitration where it takes action which the Union contends violates the Agreement.

On April 17, 1975, the Company notified the Union that it was going to change the work cycles on bus runs from Vancouver to Seattle and Seattle to Portland from six days on, three days off and four days on, three days off, respectively, to five days on, two days off. The change was to be effective June 25. (App. A, pp. ii-iii; App. B, p. xiv)

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*References to the Appendices to the Petition are cited as "App. ...., pp. ....".

The Union protested the change and contended that the Agreement prohibited the Company from making the change without the Union's consent. The Company contended that it had a perfect right under the collective bargaining agreement to make that change. The Union asked the Company to arbitrate the dispute immediately and, pending arbitration, to maintain the status quo. The Company agreed to immediate arbitration and named the Company's arbitrator. It declined to maintain the status quo pending arbitration. (App. A, p. iii-iv; App. B, p. xiv) Instead of taking the Company up on its offer to arbitrate immediately, the Union filed this proceeding on June 2, 1975. (App. B, pp. xiv-xv)

The complaint sought to enjoin the implementation of the new 5-2 run cycle pending arbitration, and the Union moved for a preliminary injunction. The District Court set the mater for an evidentiary hearing on June 17, 1975. The matter was argued on June 19. At that argument the Court expressed its opinion that the Union's showing of irreparable injury was "flimsy at best". Then on June 20 the Court issued its Order granting a preliminary injunction prohibiting Greyhound from changing the "present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement". (App. A, p. xii)

The Order provided that the Union should file a bond for "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction". (App. A, p. xii) Greyhound moved for an order to require the bond to be conditioned so that it was payable upon the arbitrator ruling in favor of Greyhound. On June 30, 1975 the Court denied that request. (App. B, p. xvi)



The Ninth Circuit affirmed the issuance of the preliminary injunction and Greyhound petitioned this Court to review that judgment by writ of certiorari. This Court granted the petition and vacated the judgment for reconsideration in light of *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976). On reconsideration the Ninth Circuit reversed. It held issuance of the injunction improper because Greyhound had neither explicitly nor implicitly promised to maintain the status quo and because Greyhound's action would not "frustrate and interfere with the arbitral process", but would leave it "unaffected". (App. D, pp. xxix-xxx)

## ARGUMENT

The Petition asks this Court to determine the principles which should control the issuance of a preliminary injunction in an arbitrable labor dispute. This Court has already considered that question and has already established those principles. Moreover, those principles are clear and undisputed. The lower courts have received ample guidance as to their application, most recently by this Court's decision and opinion in *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976). There is no reason for this Court to pass on those principles again.*

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*Greyhound's original Petition to this Court said that the Court had "never before directly passed" on the circumstances in which "a district court may restrain an employer in an arbitrable labor dispute from taking action pending arbitration". (Petition, No. 74-1584, p. 9) That was before *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976), was decided. Although *Buffalo Forge* involved an injunction action against a union, the principles it establishes apply to actions against an employer as well, and the Ninth Circuit so held in this case. See also *United Mine Wkrs. v. Rochester & Pitts. Coal Co.,* 416 F.Supp. 74, 77-78 (W.D. Pa. 1976); *Note, The Supreme Court, 1975 Term,* 90 HARV. L. REV. 251-54 (1976).

Finally, far from proving any error of law, the Petition demonstrates that the Ninth Circuit applied the correct principles in its consideration of this case. The most that the Petition does is to raise questions of fact. As to that, the Petition is wrong on the facts.

### I. The Principles Which Control the Issuance of Injunctive Relief in an Arbitrable Labor Dispute Have Been Clearly Established by This Court.

The decisions of this Court have established that the judiciary may not intrude into an arbitrable labor dispute where that intrusion is not necessary to make the arbitral process work. That principle derives from the congressional and judicial policy that the preferred method for resolution of labor disputes is "[f]inal adjustment by a method agreed upon by the parties. . . ." Section 203(d) of the Labor Management Relations Act (the "Act"), 29 U.S.C. § 173(d); see, *e.g., Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411-12 (1976). Ever since the *Steelworkers' Trilogy,*• this Court has made it clear that "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 566 (1960).

First, the *Steelworkers' Trilogy* establishes what a court is not to do when faced with an arbitrable labor dispute. The *Steelworkers' Trilogy* teaches that where the parties have agreed to arbitration, they have bargained for a decision by the arbitrator, not a court. Accordingly, "the courts

•*United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).



have no business" becoming involved in the merits of disputes over the interpretation or application of collective bargaining agreements. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960).

> "[I]n the *Steelworkers Trilogy* we emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 242-43 (1970).

This Court recently reaffirmed that principle:

> "[T]he parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage." *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 412 (1976).

Second, the *Steelworkers' Trilogy* establishes that when faced with an arbitrable labor dispute, "the function of the court is very limited". *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960). The *Trilogy* goes on to define what that "very limited" function is. "The judiciary sits . . . to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585 (1960). The arbitrator "sit[s] to settle disputes." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960). Where the arbitral process is working by itself and the arbitrator has the jurisdiction and ability to settle the dispute, there is no need for the courts to intervene and therefore the courts should stay out of it.

Thus in a Section 301 suit a court may not become a participant in an arbitrable dispute "for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator". *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411 (1976). Instead, its role is limited to "enforcing promises to arbitrate", *Id.,* at 411; see *Id.,* at 409, by enjoining conduct which "would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute". *Id.,* at 407.

This Court has consistently adhered to these principles. A party who refuses to arbitrate a dispute he promised to arbitrate may be ordered to arbitrate. In such a situation the reluctant party has violated his promise to arbitrate, and judicial intervention is necessary to make the arbitral process work. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). Similarly, where a party to a dispute tries to thwart the arbitral process by force or by acting in such a way as to render the arbitrator's decision futile, he has in effect violated his promise to arbitrate because he has made it impossible for the arbitral process to work. Here, too, the judiciary may intervene. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 253-54 (1970); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960).

However, where conduct does not violate a party's promise to arbitrate, the judiciary may not intervene. Thus in *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970), this Court held that a district court may enjoin a violation of a no-strike clause where the strike is over an arbitrable dispute. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,*



370 U.S. 254 (1962), this Court held that a district court may not entertain an action for damages for violation of a no-strike clause, which was also over an arbitrable dispute. In the first case an injunction was required to make the arbitral process work, because the strike thwarted that process; therefore the judiciary could intervene. In the second there was no need for judicial involvement because the strike was over, and it did not thwart the arbitral process; therefore the judiciary could not intervene.

In *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960), a case brought under the Railway Labor Act, 45 U.S.C. § 151, *et seq.,* this Court held that an injunction against a strike may be conditioned on the employer's maintaining the status quo pending arbitration, only where that condition is necessary "to preserve the jurisdiction of the [Arbitrator] . . . ." That is, where absent the condition "a decision of the . . . [Arbitrator] in the unions' favor would be but an empty victory". 363 U.S. at 534.* *Accord, Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748, 753 (2d Cir. 1964); *Local 757 v. Budd Co.,* 345 F.Supp. 42, 47 (E.D. Pa. 1972) (a Section 301 case).**

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*The railroad's action in *Brotherhood* did "not merely concern rates of pay or job assignments", but involved the elimination of some jobs and the relocation of others in a situation in which by the time of the "frequently long-delayed . . . [decision by the arbitrator] it might well be impossible to make . . . [the employees] whole in any realistic sense." 363 U.S. at 534. This Court ruled that requiring the railroad to preserve the status quo in order to preserve the jurisdiction of the arbitrator was not an abuse of discretion. 363 U.S. at 535.

**Similarly, *Chicago & N.W. Ry. v. United Transportation Union,* 402 U.S. 570, 583 (1971), also a Railway Labor Act case, holds that a union may be enjoined from striking when it has not performed its statutory duty to "exert every reasonable effort to make and maintain agreements . . ." only where "such a remedy is the only practical, effective means of enforcing the duty. . . ."

Just last term this Court again applied these principles and held that a court has no authority to enjoin a sympathy strike alleged to be in violation of a collective bargaining agreement. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). There the propriety of a sympathy strike under a collective bargaining agreement was itself the dispute which was subject to arbitration. The strike did not "interfere with and frustrate the arbitral processes" because it had "neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain". *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407-08 (1976). If the arbitrator ruled in the company's favor he could simply order the sympathy strike stopped and that order would be subject to judicial enforcement. *Id.* at 405. Moreover, enjoining the sympathy strike pending arbitration would grant preliminarily the very relief which only the arbitrator could grant permanently and on the merits. Therefore to grant that relief necessarily would intrude the court into "preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator", and accordingly would impermissibly permit the court "to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process". *Id.*, at 410-11. That, *Buffalo Forge* held, a court may not do.

These cases underscore and illustrate the "very limited" role which courts may play in resolving arbitrable labor disputes. The principle they lay down is that a court may not intervene in an arbitrable labor dispute except where such intervention is "essential to carry out promises to



arbitrate and to implement the private arrangements for the administration of the contract." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 at 411 (1976). Therefore an employer may not be restrained from taking disputed action pending arbitration where such an injunction is not necessary "to preserve the jurisdiction" of the arbitrator or where that remedy is not the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile". See, pp. 7-10, above; *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1341-42 (3d Cir. 1976); *Note, The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 247-55 (1976) (courts may "intervene only when necessary to protect the arbitral jurisdiction and then only in a manner that avoids examination of the merits". 90 Harv. L. Rev. at 251).

These are precisely the principles applied by the Ninth Circuit in this case. The judgment below rests on the holding that Greyhound's conduct here did not interfere with the arbitral process, but left it "unaffected"; if the arbitrator were to rule against Greyhound, the "situation [could] be restored substantially to the status quo *ante*":

> "While a promise to submit a dispute to arbitration may justify a finding of an implied duty not to strike, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), such a promise does not imply a duty on the part of the employer to preserve the status quo pending arbitration. The source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not. The implication of a duty not to strike may be 'essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract.' *Buffalo Forge Co. v. United Steel-*

*workers of America, supra,* ..... U.S. at ....., 96 S. Ct. 3149. Ordinarily there will exist no such necessity to imply a duty to preserve the status quo. *In any event, it is clear that in this case the arbitration of the dispute will be unaffected by Greyhound's alteration of the status quo. Should Greyhound be wrong in its position in arbitration the situation can be restored substantially to the status quo ante. Cf. Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970)." App. D, pp. xxix-xxx (emphasis added).

Contrary to the Union's assertion (Pet., pp. 28-29), the Ninth Circuit's holding does not conflict with that of the Fourth Circuit in *Lever Bros. Co. v. Intern'l Chem. Wkrs.*, .... F.2d ...., 95 LRRM 2438 (4th Cir. Nov. 30, 1976). In *Lever Bros.* the employer did not simply propose to change the hours which its employees worked. Instead, it intended permanently to transfer its plant from Baltimore, Maryland to Hammond, Indiana. 95 LRRM at 2442. The Fourth Circuit held that those facts made *Lever Bros.* a different case from this case. Unlike this case, the Fourth Circuit found, the preliminary injunction there was necessary "to save the arbitration clause," 95 LRRM at 2440, because the arbitrator "could not return the parties substantially to the *status quo ante*", 95 LRRM at 2443, and the employer's action would therefore render an arbitration award in the union's favor "'an empty victory' for the union". 95 LRRM at 2442.Thus there is no conflict between the Fourth Circuit's decision in *Lever Bros.* and the Ninth Circuit's decision here. The Fourth Circuit addressed a situation which the Ninth Circuit did not need to reach. The Fourth Circuit's holding that an injunction may issue to prevent conduct which would render the arbitral process "a hollow formality", 95 LRRM at 2443, is not inconsistent



with the Ninth Circuit's holding that no injunction may issue against conduct which does not have that effect.*

The Union also attempts to create a reviewable issue by arguing that this case does not involve an injunction against a union and therefore that Section 4 of the Norris-LaGuardia Act, which prohibits such injunctions, is inapplicable. (Pet., pp. 10-15) That argument is beside the point. To begin with, the Union must prove a violation of some contract right for there to be jurisdiction to issue a Section 301 injunction, and the issue is not whether Norris-LaGuardia Section 4 prohibits the enforcement of that contract right, but whether the right exists.** It does not. (Part II, below)

Moreover, the principles which govern the judiciary's function in arbitrable labor disputes derive not from Section 4, but from the central role which arbitration plays in the national labor relations policy.*** Those principles

*The Fourth Circuit noted that:

"Whether or not Greyhound was permitted to unilaterally alter the work schedules of its employees under the collective bargaining agreement, the employees would still be employed, and still earn wages albeit on different schedules. In his award, the arbitrator *could* subsequently alter pay schedules or revise the work schedules depending on whether he found for the union or the company and return the parties to substantially the *status quo ante*." 95 LRRM at 2443.

**The Union recognizes that, but tries to assume the question away. It relies on an earlier case in which the Ninth Circuit found that "the suit does fall within Section 301" (Pet., p. 15); this suit, however, does not, because no Section 301 right was violated here. (Part II, below)

***The requirement in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960), that the status quo be maintained pending arbitration was directed at the employer, not the union. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254 (1962), was an action for damages; Section 4 had no application to it. Each of the cases which makes up the *Steelworkers' Trilogy* was an action by the union against an employer. So was *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

do not change depending on whether the employer or the union is the plaintiff. See *United Mine Wkrs. v. Rochester & Pitts. Coal Co.*, 416 F.Supp. 74, 77-78 (W.D. Pa. 1976); *Note, The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 251-54 (1976).

Indeed, the Union's lengthy discussion of Section 4 of the Norris-LaGuardia Act is proved irrelevant by the Union's own argument. The Union explicitly admits that this case is governed by the principles set forth above. Thus the Petition says that "The test for issuing injunctions pending arbitration is whether, in the absence of equitable relief, 'the arbitration process will be frustrated' 428 U.S. at 412." (Pet., p. 22) See also Pet., p. 21 (can only enjoin conduct which "'interferes with and frustrates arbitral process'"); Pet., p. 26 (may issue injunction to prevent conduct "'so irreparable that a decision by the [arbitrator] in the union's favor would be but an empty victory'").

Thus the Petition presents no question of law for this Court to consider. The principles which govern this case are clear and undisputed. The most that the Union does is to argue the facts. There is no reason for this Court to become involved in such factual disputes. Moreover, the Union is wrong as to the facts.

First, the Union tries to distinguish *Buffalo Forge* on the facts. The Union says that in "*Buffalo Forge*, there was no promise to arbitrate the underlying dispute", whereas in this case "the underlying dispute was arbitrable". (Pet., p. 22) But that misunderstands the facts of *Buffalo Forge*. The dispute in *Buffalo Forge* was "whether the sympathy strike violated the Union's no-strike undertaking". 428 U.S. at 410. That dispute was subject to arbitration. 428



U.S. at 410; Pet., p. 19.* Thus the union's right (or duty not) to take the action of striking was itself the arbitral dispute; the action was not an attempt to frustrate the arbitral process by using economic warfare to win an arbitrable dispute; and therefore it could not be enjoined. The dispute in this case is whether action by Greyhound to change the work cycle of bus drivers violated the terms of the collective bargaining agreement. That dispute was subject to arbitration. (Pet., App. A, p. iii; App. B, p. xiv) Thus Greyhound's right (or duty not) to take the action of changing the work cycle was itself the arbitrable dispute; the action was not an attempt to frustrate the arbitral process by using economic warfare to win the dispute;** and therefore it could not be enjoined. The only difference between this case and *Buffalo Forge* is that the parties are reversed. That difference makes no difference.

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*The Petition says that the events which caused the sympathy strike were not subject to arbitration. (Pet., p. 22, n. 7) That is irrelevant. The economic causes of Greyhound's decision to change the work cycle were equally not subject to arbitration. The dispute in *Buffalo Forge*—whether the sympathy strike violated the collective bargaining agreement—was subject to arbitration, just as was the dispute here—whether Greyhound's action violated the collective bargaining agreement.

**That is why the Union's assertion that the Company's action was "self help", like a strike, is, at best, a play on words, and is certainly wrong. The injunction was necessary, the Union goes on, to prevent Greyhound from making the work cycle changes and thereby "circumventing the arbitration process by pressuring the union, through such changes, to make concessions on a disputed issue". (Pet., p. 25, n.11) But the Union does not say what it was that Greyhound was "pressuring" it to do. Greyhound's action was not "pressuring" the Union to make "concessions" on some dispute any more than was the sympathy strike in *Buffalo Forge*. Greyhound's action *was* the dispute. The way to resolve the dispute was to arbitrate it; Greyhound's taking the action did not and could not pressure the Union into not arbitrating it; indeed so far from trying to "pressure" the Union into making such a "concession", Greyhound affirmed its willingness to make good its promise to arbitrate, and did.

The Union also argues the facts of this case. It says that Greyhound's action should have been enjoined because it would cause "irreparable" injury. (Pet., p. 23) To begin with, one cannot be irreparably injured by being deprived of a right he does not have. The Union did not bargain to have the employer maintain the status quo pending arbitration. It bargained for the right to have the arbitrator decide disputes and, if he ruled in the Union's favor, to fashion an appropriate remedy. Greyhound agreed to arbitrate the dispute and did. Therefore the Union got everything it bargained for, and was deprived of nothing.* (See Part II, below.) Moreover, the supposed irreparable injury was that some bus drivers would have to work five (5) days a week for pay pending arbitration. That "irreparable" injury was said by the District Court to be "flimsy at best" (R. Tr. 200) and the Ninth Circuit merely held that the finding was "not clearly erroneous" or "an abuse of discretion". (Pet. App. B, p. xxii)

Most important, the test is not whether a party would suffer "irreparable" injury pending arbitration, but whether injunctive relief is necessary to prevent the arbitral process from becoming a nullity. There are many injuries which might be said to be "irreparable" in the abstract which do not meet that test. For example, the injury caused by the sympathy strike in *Buffalo Forge*—the employer's inability to operate—was at least as "irre-

*The Union recognizes that it must be deprived of a right in order to be irreparably injured. It says it was deprived of the "benefit it expected to receive by agreeing to arbitration" (Pet., p. 18), and that the "benefit it bargained for" was that the employer would not change the status quo pending arbitration. (Pet., p. 22) The trouble is the Union bargained for no such right, and the Agreement contains no such terms.



parable" as the so-called injury here.* Yet neither of these injuries is " 'so irreparable that a decision of the [arbitrator] . . . would be but an empty victory.' " Pet., p. 26; *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 534 (1960). Here Greyhound's action left the arbitral process "unaffected"; had the arbitrator ruled against Greyhound, "the situation [could have been] restored substantially to the status quo *ante*." (Pet. App. D, p. xxx)

The Ninth Circuit was right on the facts as well as the law.

## II. The Ninth Circuit Correctly Ruled That No Injunction Could Issue Where There Was No Wrong to Enjoin.

The Union complains that the Ninth Circuit failed to imply a promise by Greyhound to preserve the status quo pending arbitration. (Pet., pp. 22-28) Although the Union initially seems to say that the Ninth Circuit made an error of law in requiring such a promise (Pet., pp. 17-18), it later abandons that theory and expressly says that an employer's action pending arbitration may be enjoined only if that action violates such an implied promise.** (Pet., pp. 24-25) That concession is understandable.

Section 301(a) of the Labor-Management Relations Act grants the district courts jurisdiction to hear suits "for violation[s]" of labor contracts, and no other suits. Therefore, a district court has no jurisdiction to issue a Section

*See also, *e.g.*, *Letter Carriers, Branch 352 v. U.S. Postal Service*, 88 LRRM 2678 (S.D. Iowa 1975) (elimination of 10-minute wash-up period found to be "irreparable").

**The Union says that an employer impliedly promises to refrain from action pending arbitration which would cause "irreparable harm". (Pet., p. 25 and n.11) That, however, is not the right test. (See Part I, above.)

301 injunction absent a finding that the conduct to be enjoined violates the applicable labor contract. See, *e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (holding a party to a labor contract cannot be ordered to arbitrate a dispute unless his refusal to arbitrate violates the contract). *Accord, John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1966); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). *Compare, Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 380 (1974) (holding union cannot be enjoined from striking unless strike violates a contract duty); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 408, n.10 (1976) (discussing *Gateway*). Moreover, district courts have no authority to enjoin conduct just because "it is claimed to be in breach of [a labor] contract and because this claim is itself arbitrable". *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 at 408-09, n.10 (1976). *Buffalo Forge* and other decisions of this Court establish that a district court's Section 301 jurisdiction with respect to disputes arbitrable under labor contracts is limited to enforcing "the arbitration provisions of such contracts". *Id.*, at 409; see Part I, above.

An employer's promise "to submit grievance disputes to the process of arbitration" is the "quid pro quo" for the no-strike clause. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). Therefore an employer who agrees to arbitrate an arbitrable dispute has made good on his side of the bargain, and has done all he promised to do. If he has in fact promised further to maintain the status quo pending arbitration, his failure to maintain it might be in violation of his promise to arbitrate, and his



conduct might, in a proper case,* be enjoined. But absent such an extra promise, an employer who takes action and who voluntarily submits a dispute as to the propriety of that action to arbitration cannot be said to have violated his promise to arbitrate. Therefore, he has done no wrong to be enjoined in a Section 301 suit, and there is nothing to enjoin him from doing.**

Where an employer's action does not violate the promise to arbitrate, the only possible predicate upon which a court may issue a preliminary injunction against that conduct would be the court's preliminary view that the conduct violates some substantive promise of the contract. But whether that promise is violated and how to enforce it is precisely what the parties bargained to have the arbitrator, not the courts, resolve. Therefore the courts have no busi-

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*Not every employer action in violation of such a promise could be enjoined, just as not every strike over an arbitrable dispute can be enjoined. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 253-54 (1970). Those employer actions, such as a lockout, which are attempts to force a settlement by economic force, are the classic examples of actions which could properly be enjoined. Other such situations would appear to be rare. (Pet. App. D, pp. xxix-xxx) At least in the ordinary case, whether an employer has promised to maintain the status quo pending arbitration and, if so, what remedy should be imposed for violation of such a promise, are matters to be resolved by the arbitrator, not the courts. *Detroit News Pub. Ass'n v. Detroit Type Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

**The parties have bargained for a decision by the arbitrator and a remedy fashioned by him. Where the parties have submitted a dispute to arbitration, they have done what they agreed to do, and the arbitrator's award is precisely what they bargained for. Had the parties "anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Judicial intervention prior to the arbitrator's decision would thus disrupt normal labor-maangement relations. It would also prejudice the arbitrator's decision. *Id.*, at 412.

ness resolving those questions preliminarily or at all. Were they to do so, it could "embroil the district courts in massive preliminary injunction litigation". *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411 n.12 (1976). See *United Mine Wkrs. v. Rochester & Pitts. Coal Co.,* 416 F.Supp. 74, 77-78 (W.D. Pa. 1976). That would necessarily intrude courts into "a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets,* but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. . . ." *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 410-11. This a court cannot do. *Id.,* at 410-12; see *Note, The Supreme Court, 1975 Term,* 90 HARV. L. REV. 252-55 (1976). Accordingly, the rule of law adopted by the Ninth Circuit was plainly right; Greyhound could not be enjoined, pending arbitration, from making the disputed change in the work cycle absent a promise to refrain from that action pending arbitration.

As to the facts, Greyhound did not promise to maintain the status quo pending arbitration. It did not do so expressly. It did not do so by implication, either. The only basis from which to imply such a promise is the arbitration provisions of the contract. The only promise which can be implied from them is a promise not to engage in economic warfare—*i.e.,* a lockout—which would deprive the other party of the benefit of his bargain to have the dispute arbitrated. Greyhound's action here would not and did not have that effect because it would not and did not interfere with or frustrate the Agreement's arbitration provisions; it



left them "unaffected". (Pet., App. D, p. xxx; see Part I, above.)*

Here the Union was not deprived of its bargain. It bargained for arbitration, not a maintenance of the status quo pending arbitration. The Union got that arbitration; the arbitrator ruled against it; and the disputed change in the work cycle has been put into effect. The Union bargained for no more and was entitled to no more. Therefore an injunction restraining Greyhound from taking action pending arbitration would give the Union relief to which it was not entitled to protect a right it never had and for which it never bargained. Moreover, unless the injunction bond were conditioned to be payable upon the Union's losing before the arbitrator, it would give that relief without requiring the Union to compensate the employer for the injury caused by being prevented from taking action it had a perfect right to take.** Worse still, the issuance of such a preliminary injunction would necessarily intrude the district court into the merits of an arbitrable labor dispute. The Ninth Circuit correctly reversed the district court's judgment, which did all those impermissible things.

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*The Union also argues that a labor contract includes general labor law principles as implied terms. (Pet., pp. 27-28) That may be so, but it is of no help to the Union. The labor law principle the Union wants implied in this Agreement does not exist, and is in fact contrary to the basic labor law principles that do exist.

**If this injunction were proper, the bond should have been conditioned to be payable upon the Union's losing before the arbitrator. It is not right to permit the Union to come into court; prevent the employer from taking an action the arbitrator rules the employer had the right to take all along; and then leave the employer holding the bag, with no compensation for being deprived of its rights.

## CONCLUSION

The Petition should be denied.

Dated: July 28, 1977.

Respectfully submitted,

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